In the United States
Circuit Court of Appeals
For the Ninth Circuit

JAMES E. BOULDIN, JENNIE N. BOULDIN, ET ALS.,
Appellants.

—vs.—

JOSEPH E. WISE AND MARGARET W. WISE,
Appellees.

No. 2719.

Additional Brief of Appellants

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Attorneys for Appellants, Bouldin.

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ADDITIONAL BRIEF OF THE BOULDIN APPELLANTS ON THE CLAIM OF JOSEPH E. WISE AND MARGARET W. WISE TO AN UNDIVIDED ONE-NINETEENTH INTEREST IN THE LAND IN CONTROVERSY THROUGH DEEDS FROM CERTAIN PERSONS CLAIMING TO BE HEIRS OF AN ALLEGED ANTONIO BACA.

ASSIGNMENTS OF ERROR.

The appellants Bouldin, who are appealing from the decree of the court below on this question, assigned as error,

1. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to questions as follows:

> "Q. Mr. Baca, you have already stated that Prudencio Baca, who was a son of Luis Maria Baca, died in 1882, have you not?
>
> "A. Yes, sir.
>
> "Q. Now, prior to that time, did Prudencio Baca make any statements to you in regard to the relationship of Antonio Baca to Luis Maria Baca, deceased?"

for the reason that it had already appeared in evidence that at the time of the alleged statements by Prudencio to Marcos Baca a controversy existed as to who were the children and descendants of Luis Maria Baca, among whom was the alleged Antonio, and that it did not appear that there was no controversy in this regard at this time, and on the further ground that the said Prudencio Baca was one of the grantors of the Bouldin appellants, under whom they were claiming, and that the alleged declarations sought to be established, were made by him after he had parted with his title, and in derogation and disparagement of the title which he had conveyed, and upon the further ground that it appeared that the defendants Joseph E. Wise and Lucia J. Wise were claiming under the deeds of 1864 and 1871, and that the Bouldin appellants were claiming under said deeds; that in said deeds

were recitals or covenants that the grantors therein, among whom was said Prudencio, were the owners in fee simple of said Baca Float No. 3, and had full right to sell the same, and that the grantors were the sole heirs of Luis Maria Baca, (the said alleged Antonio not being a grantor in said deeds), and that the said Joseph E. and Lucia J. Wise, claiming under said deeds, and under said Prudencio, were estopped as against said recitals and covenants, to deny as against said appellants Bouldin the truth thereof.

2. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to questions, as follows:

> "Q. Now, will you please state what Prudencio Baca said to you on the subject of the relationship of Antonio Baca to his father Luis Maria Baca, at the conversation at Pena Blanco, 1873?"

The same objections to this evidence were made to the testimony previously quoted. For the sake of brevity we will not repeat them here.

3. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, as follows:

> "Q. Please state what Prudencio Baca said to you in 1873 at Pena Blanco in regard to who Antonio Baca was, and in regard to his relationship, if any, with Prudencio Baca himself, or Luis Maria Baca? A. I was inquiring from him who the children of Luis Maria Baca were.

Q. Go on and state what he said.

A. He gave me the names, amongst them the name of Antonio, as the eldest child of Luis Maria.

Q. The eldest child?

A. Yes, sir.

Q. Antonio Baca?

A. Yes, sir."

4. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to the following questions:

"Q. Now, you will please state the substance of that conversation, so far as it related to Antonio Baca."

5. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to questions as follows:

"Q. Did you know a Manuel Baca who was a son

of Luis Maria Baca?

A. Yes, sir.

Q. You have stated already you had a conversation with him in regard to Antonio?

A. Yes, sir.

Q. Now, please state the conversation that took place with Manuel Baca at that time in regard to Antonio Baca."

6. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, given in response to questions as follows:

"Q. You said you were acquainted with Domingo Baca, a son of Luis Maria Baca?

A. Yes, sir.

Q. Please state what he said on the subject of Antonio Baca, the relationship of Antonio Baca to Don Luis Maria Baca."

7. The action of the trial court in admitting in evidence the testimony of Marcos C. de Baca, in response to questions, as follows:

"Q. Now, in the conversation you had with Prudencio Baca was anything said in regard to whether or not Antonio Baca had any children?

A. Yes, sir.

Q. I am speaking now of the conversation of 1875. What did he say on that point?"

All of these questions were objected to on the grounds set out at the head of this section. It all involves the same questions, and consequently we will not repeat the objections here at length. Suffice it to say that

these appellants objected to all the testimony sought to be elicited above on three grounds. First,—That they were not statements made ante litam motam. Second,—That they were statements made by grantors after they had parted with their title, and in disparagement of the title of their grantees. Third,—That Joseph E. Wise claims title to the land in controversy under the same deeds through which these appellants deraign their title, and therefore cannot be permitted while claiming title under those deeds to deny the truth of the recitals therein as against these appellants.

A general objection was also made to the admission of all the testimony of Marcos C. de Baca, and to the admission of the deeds from the heirs of the alleged Antonio Baca for this last reason.

A STATEMENT OF THE CASE.

We have made a statement of the case as far as it affects us in our main brief, and for the sake of brevity will not repeat that statement here.

POINTS.

I.

The statements of Prudencio, Manuel and Domingo Baca, as testified to by Marcos C. de Baca, to the effect that there was a son of Luis Maria Baca named Antonio Baca, and that this son Antonio Baca left heirs, were inadmissible because they were statements made by the grantors in a deed after they had parted with their title and in disparagement of the title of their grantees.

II.

The statements of Prudencio, Manuel and Domingo Baca, as testified to by Marcos C. de Baca, to the effect that there was a son of Luis Maria Baca named Antonio Baca, and that this son Antonio Baca left heirs, were inadmissible because they were not made ante litam motam.

III.

The defendant, Joseph E. Wise, claims title under the Hawley deed and the confirmatory deed, and therefore is bound by all the recitals in those deeds.

IV.

The testimony of Marcos C. de Baca is contradictory, improbable and not worthy of belief.

V.

The title involved in this suit is derived under the act of congress of June 21st, 1860, and in the grant made by the sixth section of that act neither Antonio nor his heirs could have had any interest.

ARGUMENT.

I.

The statements of Prudencio, Manuel and Domingo Baca, as testified to by Marcos C. de Baca, to the effect that there was a son of Luis Maria Baca named Antonio Baca, and that this son Antonio Baca left heirs, were inadmissible because they were statements made by the grantors in a deed after they had parted with their title and in disparagement of the title of their grantees.

The rule is thus stated in Cyc.:

> "Declarations of a grantor made after his grant in disparagement of his title are not admissible against his grantee or other person claiming through or under him to impeach the deed."
> 16 Cyc. 987.

The testimony of Marcos Baca was offered, of course, for the purpose of proving declarations of Prudencio, Manuel and Domingo Baca as to the existence of the brother named Antonio, and therefore to show that the deed which the declarants signed did not carry the full title.

Prudencio, Manuel and Domingo Baca all signed the deed to Watts, and each of them covenanted that those signing the deed had the full title. The declarations testified to by Marcos Baca are all in disparagement of the title which they had theretofore undertaken to convey to Watts. To admit evidence of such declarations is directly to permit them to overthrow in part the title which they had theretofore claimed and undertaken to convey.

While the declarations testified to by Marcos Baca might, if made by one who had not theretofore attempted to convey the title, have been admissible for the purpose of providing pedigree, to admit them for that purpose is to violate another elemental principle of evidence, and one of greater importance to the stability of titles.

The author of the article in Cyc to which we have invited attention, cites in support of the rule stated by him adjudicated cases from most of the states of the Union. Further cases are collected in annotations to Cyc. The text writers all agree that such declarations are wholly inadmissible. Jones on Evidence, section 245. 1 Greenleaf, 189; 2 Wigmore, Sec. 1085. The cases are so numerous that it is impossible to cite or quote all of them. We invite attention to the following:

> "The disclaimer and admissions of a grantor made after he has parted with his title to and possession of property are not admissible to impeach the title

of his grantee, immediate or remote.

Kurtz vs. St. Paul D. R. Company (Minn.) 63 N. W. 1.

"Such declarations are not admissible to defeat the grantee's title when made after the grantor has parted with the title and possession of the property. If such admissions be competent to defeat a deed duly delivered, no security could be given to deeds, as they would overthrow such deeds when offered, as in the case when the person making them had no interest in upholding his former title."

Leonard vs. Fleming, (N. D.) 102 N. W. 308.

"The admissions or declarations of the grantor with reference to this title made subsequent to his parting with title can never be admissible against his grantee. This is a fundamental principle of evidence that is too well established to require discussion."

Josslyn vs. Daly, (Idaho) 96 Pac. (Reading page 570, where numerous authorities are cited.)

"It has long been the settled law that the declarations of a grantor made after the transfer of both title and possession cannot be received in evidence as against the grantee."

Lent vs. Shear, (N. Y.) 55 N. E. 2. (This case col-

lects and cites the New York cases on the subject.)

The Texas cases holding the same doctrine are collected in West vs. Houston Oil Company, 136 Fed. (C. C. A.) 343.

In Burk vs. Hand, (N. J.), 16 Atl. 693, it was sought to show the acts and declarations of the grantor who made a deed in 1768 and who afterwards, in 1786, deeded to other persons.

The court says:

> "Nor are the declarations and acts of Silas Swain (the grantor) after the delivery of this deed competent evidence to overthrow it."

In Prittchard vs. Fowler, 55 Southern, 147, the question involved was whether one Fowler was sane when he made a certain deed to George and Cornelius Fowler. Evidence was offered of declarations made by Cornelius as to the mental condition of his grantor. The Supreme Court of Alabama, in passing upon the admissibility of this evidence, said:

> "While the declarations of George Fowler and of Cornelius Fowler in disparagement of their title might be admissible against them, or those holding under them, yet what Cornelius may have said as to how George acquired possession of the land could not be admissible if made after Cornelius conveyed his interest in the land to George."

In refraining from citing and quoting from other decided cases we do so only because they are so numerous that to undertake the task would be unduly to extend this brief. Furthermore, there is no conflict of authority.

The declarations of Prudencio, Manuel and Domingo Baca, as testified to by Marcos Baca, were made aftey they had parted with title, and directly disparaged, and in part destroyed, the title they had made. We are the grantees of Prudencio, Manuel, and Domingo, and as against us, the evidence is unquestionably not competent.

We would call the court's attetnion to the fact that such evidence is incompetent, that it is an infirmity in the evidence itself, and that nothing can be proved by it. As said by Jones, Sec. 241:

> "But the declarations of the grantor are not to be treated as admissions, and are not competent, if made before his interest in the property in question was acquired, or after he has conveyed it away, since the acts and declarations of the grantor after he has divested himself of his estate cannot be admitted to impeach the title of the grantee."

The objection therefore is not to the character of the witness or the weight or worth of the testimony, but such evidence is incompetent, and cannot be used.

Nor would an avowal that the evidence was not offered to disparage and defeat the title, but was only of-

fered to prove pedigree, be of any worth, if in fact the evidence did disparage the title of the grantee, and the effect of the evidence was to defeat the title. In other words, the evidence could not be admitted under the guise of proving something else, if in truth and in fact, it did defeat the title of the grantees, for evidence of this kind is not competent.

We have two rules: (1) Hearsay is competent to prove pedigree. (2) Hearsay declarations of a grantor are not admissible to disparage the title of a grantee. Having two rules they must be harmonized, and harmonized they are. Hearsay is admissible to prove pedigree, but declarations of a grantor, whenever they disparage the title of his grantee, are inadmissible as against the grantee, and if hearsay of pedigree disparages the title of the grantee, it cannot be received.

In this case the very hearsay declaration as to pedigree are the ones that disparage the title. As they do disparage the title, and in part destroy it, we then have a title impaired, in part, destroyed by declarations of the grantors, after they had disposed of their titles.

The way was open to the defendants Wise to prove pedigree by hearsay, but in so doing they could not use Prudencio, Manuel and Domingo, persons whose declarations would destroy or impair the title they themselves had conveyed. In other words the rule (that a grantor shall not be permitted, after he has conveyed and been paid the price, based on his covenants, to make declaration against his grantee that will destroy

what he has sold) is higher and of more controlling character than the proof of pedigree. If the defendants Wise desired to prove pedigree, it was incumbent upon them to do so by declaration of person whose mouths were not closed by their own acts against their grantees.

II.

The statements of Prudencio, Domingo and Manuel Baca, as testified to by Marcos C. de Baca, to the effect that there was a son of Luis Maria Baca named Antonio Baca, and that this son Antonio Baca left heirs, were inadmissible because they were not made ante litam motam.

The rule is that hearsay declarations as to pedigree are only admissible in evidence when made ante litam motam. Under this rule it is not necessary that suit actually be begun. All that is necessary is that the controversy which ended in the suit shall have commenced. If the declarations sought to be shown by hearsay testimony were made after the controversy which resulted in the suit was begun, then they are inadmissible because not made ante litam motam.

Wigmore thus states the rule in Paragraph 1483.

> "On the other hand, it is not necessary that litigation should actually have begun at the time of the declaration. The element to be avoided is a bias in the mind of a declarant; and this is sufficiently probable if a dispute or controversy is actually in progress, even though it may not have reached the stage of legal proceedings."

See also: Rollins v. Wicker, 70 S.E. 934- In re Waldens Estate 137 Pac. 35.

Marcos C. de Baca testified (Rec., page 346) that a suit was brought early in 1875 against the heirs of Luis Maria Baca for the partition of Baca Location No. 1, and the Ojo del Espiritu Santu grant.

He further testified that in that case the point in controversy was, who the heirs of Luis Maria Baca were (Record, page 352).

He further testified that he heard discussions ot claims about the Baca Location No. 1 prior to 1873, and that he heard discussions and claims about the Ojo del Espiritu Santu grant in 1873.

The witness was a lawyer and in his presence counsel for the parties who sign this brief had raised the objection that these statements were not made ante litam motam. All through, his tesimony on this point is shifty and evasive. The court will see at once on reading the testimony that he evaded direct answers to questions; but he was pinned down to the statement that he heard claims and discussions as to who owned Baca Location No. 1 and the Ojo del Espiritu Santu grant. His first conversation, he testified, with any of these heirs of Luis Maria Baca was with Prudencio Baca in 1873. According to his own testimony, at the time he had this conversation with Prudencio Baca there were claims and discussions about the Baca Location No. 1, which claims and discussions resulted in a lawsuit brought early in 1875 to determine who the heirs of Luis Maria Baca were. The statements which he says Prudencio made

to him are plainly inadmissible because not made ante litam motam.

His next conversation was with Manuel Baca, the son of Luis Maria Baca. He testified (Record, page 358) that he did not recollect whether he had any conversation with this Manuel Baca prior to 1875. He then testified that he did have a conversation with Manuel Baca in 1875. He had already testified that this partition suit was brought early in 1875, and when asked how long before the bringing of the partition suit his conversation with Manuel Baca occurred, he testified that it may have been six months, and it may have been a year. 1875 must have been an extraordinary year.

The inadmissibility of this conversation with Manuel Baca is too patent to require discussion.

His next conversation was with Domingo Baca in 1893 or 1894 (Record, page 359). He had this conversation nearly twenty years after the bringing of the partition suit in 1875, and it was therefore, of course, inadmissible.

For the reasons given above we submit that the trial court erred in not excluding the hearsay declarations of Prudencio, Manuel and Domingo Baca, on the ground that they were not made ante litam motam.

III.

The defendant, Joseph E. Wise, claims title under the Hawley Deed and the Confirmatory Deed, and therefore is bound by all the recitals in those deeds.

The defendant, Joseph E. Wise, claims title to two-thirds of the land in controversy in this case under the 1864 and 1871 deeds from the heirs of Luis Maria Baca to John S. Watts. In the 1864 deed the grantors covenanted that they were seized in fee of Baca Float No. 3, and the signers of the 1871 deed covenanted that they were all the heirs of Luis Maria Baca. Since the defendant, Joseph E. Wise claims title under those deeds, he is bound by the recitals therein. He cannot blow hot and blow cold at one and the same time. He cannot claim title under those deeds and yet deny the truth of certain parts of them. When he claims any benefit under those deeds from the heirs of Baca to Watts he must take the whole of those deeds.

In Gibson vs. Lyon, 115 U. S. 447, the court says:

> "He, (the grantor) certainly cannot be permitted to claim both under and against the same deed; to insist upon its efficacy to confer a benefit and repudiate a burden with which it has qualified it; to affirm a part and reject a part."

To the same effect are the cases of Fish vs. Flores, 43 Tex. 345.

> "To this it is sufficient to say, as appellees cannot be permitted to affirm and deny the recital in the deed at the same time and having relied upon it in support of their deed from Ocon, they are bound by it."

And Minor vs. Powers, 26 S. W. 1071-1072, 87 Tex. 83.

"Both parties claim under a deed from persons claiming to be the only heirs of Walsh, and in that deed they were so recited to be. Defendants cannot claim under this deed as from the only heirs of Walsh and deny the truth of the recitals as to the plaintiff."

IV.

The Testimony of Marcos C. de Baca Is Contradictory, Improbable and Not Worthy of Belief.

The testimony upon which the lower court allowed the claim of Joseph E. and Margaret W. Wise to an undivided one-nineteenth interest inthe land in controversy was that of one Marcos C. De Baca as to purely hearsay statements made to him forty years ago, when he was a boy of sixteen, as to the existence of and descent from an alleged Antonio Baca, who died, according to the witness' own testimony, about ninety years ago.

If there ever was such a person as Antonio Baca, and if he did leave heirs, then for more than fifty years, under the decree of the lower court, they have had an interest in this land. And not only in this land, for there are five of these Floats, each embracing one hundred thousand acres. But never in all this time have they been heard of. They have made no claim to their rights in this vast domain, and the only evidence we have of their existence is what Marcos C. de Baca says that Prudencio Baca, Domingo Baca and Manuel Baca told him forty years ago, when he was sixteen years old.

The very people who he says told him this had signed a deed two years before, in which they solemnly covenanted the exact opposite of what he says they told him. Can such a story be believed? Is it within the bounds of human probability? Most emphatically, NO.

Marcos Baca's story is a most remarkable one. It is remarkable that a boy of sixteen should be so impressed as to remember; remarkable that the persons whom he says told him had solemnly covenanted in writing only two years before, just the opposite; remarkable that **all** of the members of the family should so covenant as they did in the 1871 deed; remarkable that, if there was an Antonio, and his children should have been entitled to inherit, that they should have made no claim for fifty years; remarkable that the man who engineered the matter for Wise, is the same witness now trying to uphold what he has done; remarkable that Watts, a lawyer, when he filed applications with the government, did not mention Antonio; remarkable that Watts, when he took his deeds, knew nothing of Antonio, but did know all the rest of the family, he having lived in New Mexico for many years, and at the house of Tomas Baca, the father of the witness Baca.

Had there been but one application for a grant, Antonio's name might have been omitted by mistake; but here are two, and his name does not appear. Had there been but one deed, that of 1864, his name might have been omitted by mistake, but here are two, viz 1864 and 1871, and his name does not appear. Moreover his name

does not appear **anywhere** in either petitions for grants, or deeds. It is hardly possible that in signing deeds twice, his own brothers and sisters, then living, should have overlooked him, or his heirs.

Marcos Baca provided not a scrap of writing about Antonio. He says that some men now dead, told him there was an Antonio. In making this statement he is entirely safe, for there is no way of disputing his story of what these men now dead told him.

For more than fifty years, Antonio is unheard of. When all the others sold and got their money, in 1864 and 1871, neither Antonio nor his heirs appear. Strange, if there were such heirs, and all the rest of the family were selling out and getting money, they did not appear or make claim. There have apparently been no deeds from Antonio or his heirs, either among themselves or with strangers, for fifty years. If there had been such, it is fair to say they would have been produced. After this lapse of time, and all these circumstances, we find Mr. Wise going to New Mexico in 1913, and meeting this Mexcan lawyer, and then Antonio is habilitated. After the owners of the land, Watts and Davis and the Bouldins, had had title for more than forty years, after they had fought their battle through the Land Office and the Courts, all of a sudden, when they have something, Antonio bobs up.

Never was a claim to title so shadowy as this, so far fetched, and without foundation. Every brother and sister of Antonio, alive in 1864 and 1871, say that there

was no such person. They say this when in the 1864 deed they say they are the heirs, and when in the 1871 deed they covenant that they are all. And so every living child and descendant of the Baca family say the same thing when they signed these same deeds. Surely, if there was an Antonio and he left children, some sister, or some brother would have thought of him, or some nephew or some niece, out of the multitude of them. But he is not mentioned. In the claims before the government, not in one case, but in two, there is no mention. There is never a letter that he wrote, nor a will that he made, a deed to him or from him; not even a christening or church record, when he was born, or when he died—absolutely nothing.

Now, nearly ninety years after his death, along comes this witness and says that his great-uncle, Prudencio and his relatives Domingo and Manuel, told him there was such a person, and that his son was Juan Manuel, etc. These men are long since dead, but they are the same men who, when living in 1864, said just the contrary in writing. Surely also these men must have told Marcos Baca, at about the time or soon after, of so important a family transaction as the deeds of 1864 and 1871. These papers were recorded in New Mexico. Is it not strange that Marcos Baca for forty years, and he a lawyer, too, should have done nothing about these outstanding titles? So deep a delver into family affairs as he, beginning at sixteen when most youths have their eyes on the future, and not on the past, must have known about these deeds, have known

Antonio did not sign them, and that his alleged heirs had a title to one nineteenth of the grant, or 6,000 acres of land; and yet, nothing whatever was done until Wise, after forty years, appears on the scene with ready money. If written recorded titles may be upset by such testimony as this, no man is safe. He may hold for fifty years under a recorded written instrument, an instrument in which those who know best of family affairs, solemnly covenant that they are all the heirs and children, and then lose his holdings, and the great sums of money he has spent relying on his title, by the statement of one, that, forty years ago, when he was a boy, certain things were told him by the men who had made the title, and which statements were just the opposite of what they had covenanted.

What is to prevent Marcos Baca from saying that there is still another son? There is no evidence of such, but then neither is there any evidence of Antonio. What is to prevent Marcos Baca from saying that, forty years ago, when he was fourteen or sixteen, he was told that there was a son named Michael, and that he left a son, and so on down the line? And how could such an assertion be met? Are land titles to be disturbed by such flimsy statements? Who would believe him?

Opposed to the statement of Marcos Baca that he was told thus and so, forty or more years ago, we have the statement in writing of all of the then surviving brothers and sisters of the alleged Antonio, that no such person existed, or left heirs. Diego Baca, Luis Baca, Do-

mingo Baca, Jesus Baca, Josefa Baca, Marie Altagracia Baca, and Prudencio Baca, were, in 1864, all of the surviving children of Luis Maria Cabeza de Baca. hey signed the 1864 deed. In addition, there was Tomas, the father of the witness Marcos. These persons say in the 1864 deed, that they "are seized in fee of the lands aforesaid, and have good right and title to the same." The covenant is made for all who signed, namely, the eighteen children and their heirs. This is in effect a declaration that no other person or persons owned the land or any interest in it. This statement they could not, and would not have made, if there had been another son, or his heirs. As above stated in 1871, in the deed of that year, it is covenanted that they are the sole heirs of Luis Maria Cabeza de Baca. Also opposed are the petitions of John S. Watts to the government, and the testimony taken at that time, and published by the government fifty years ago; and on file in the Surveyor General's office in New Mexico, for a still longer time. This written evidence of the brothers and sisters themselves, of all the heirs, of the attorney for the heirs, of disinterested witnesses who testified in an official proceeding at the time, all of which has either been recorded or published for more than fifty years, is not to be upset, and a title destroyed by one who in 1915, declares by word of mouth, and without the scratch of a pen to support him, that forty years since he was told this or that. He contradicts his own father, he contradicts Prudencio, and for what? It was he, who, in 1913, got the deeds in question.

In testimony of such inherent weakness as that of Marcos Baca, the slightest breath of interest, the slightest suspicion, should destroy it. Even if there was no interest and no suspicion, even if the evidence should be as strong as it is possible for such innately weak and attenuated evidence to be, still, in that case, the statements of Marcos Baca fall far short of meeting the written evidence above pointed out, which has been matter of public record and knowledge for fifty years, and never before assailed.

Jones in his work on Evidence, Vol. 2, Sec. 317, speaking of the weight of such testimony as that of Marcos Baca, says: "Moreover it is evident that prejudicial and unscrupulous witnesses can give their own coloring to the statements which they claim to have heard from persons since deceased; and that they can do so with comparative impunity from exposure or punishment. Evidence consisting of the alleged declarations of deceased persons is so easily fabricated that it is open to suspicion; but this objection goes to the weight that should be given it, not to its competency."

And so in a leading English case, found in Book 52 of English Reprint 382, Sir John Romilly says that slight reliance is to be paid to the declarations of deceased persons, **said** to have been made before, but remembered after, the cause of litigation has arisen. Such evidence, he says, is usually given with great particularity, but is subject to no sanction.

Marcos Baca says (Rec. p. 375) that John S. Watts

made his home with Tomas Baca at Pena Blanca. There then, Watts must have met Tomas, Prudencio, and others of the family. He must have met this witness. Watts, of course, must have talked with the other surviving children of Don Luis, before, and at the time the deeds were executed. It is past comprehension that he would have overlooked Antonio, just as it is past comprehension to believe that the brothers and sisters would have made the covenant they did make, if there had been an Antonio, or if he had left heirs.

It will be observed that the conveyances were not merely of Location No. 3, but that they were of other locations as well, involving vast tracts of land. In none of them is Antonio named.

Another matter: According to this witness, he has known of Antonio and his children since 1873. In 1891, or thereabouts, the witness was admitted to the bar, and must have had some knowledge of titles. He knew of the lawsuit in 1875. He knew, he says, the different descendants of Antonio. Yet, from 1873 to 1913, a period of forty years, he took no action to get his relatives their title. During all of this time he took no action, and yet he must have known of the five different Baca Locations, and that this title of Antonio was outstanding. No suit, no claim, no demand on anyone, nothing. That is, nothing until Wise appears on the scene and pays him for his services.

Is it not strange, too, with what particularity the witness remembers that it was in 1873, that Prudencio told

him? It was not in 1875, for then a lawsuit was pending. It was in 1873, before the lawsuits. What was there about the fact that a great uncle of the witness, named Antonio, had lived, to impress a boy's mind? There were eighteen of these grand uncles and grand aunts. What was there about such a statement to sink so deeply into a boy's mind, that forty years later he can say it was in a certain year? Go back in your mind forty years, when you were a boy, and try to think whether if someone had told you about a distant relative, a relative far removed, you would be able to say, if you could remember it at all, that it was told you in a certain year? Such things are unlikely and improbable. But it will be noted of this witness Baca, that he testifies to things that happened before he was born; he says he knows them. In his statements he does not differentiate between what he knows, and what he has been told. At the same time it is very clear that he has given considerable time and attention to what he was going to say on the witness stand in this case.

And not only must the bare word of Marcos as to what these men said be taken to prove the existence of Antonio, but it must be taken for all else; that Antonio was married, that he left children, that these children left children, and who they were and what they inherited, and that they signed the Wise deeds. It is incredible that there are no writings to bear Marcos out, no letters, wills, deeds, probate records, church records of births and deaths during all this long period of time.

Clearly, Marcos Baca's testimony is inadmissible as to

recent events. The heirs could have been produced or their mothers or fathers, or records of births, etc. This is not the best evidence of recent events.

The foregoing remarks as to the untrustworthiness of Baca's testimony are proven by the testimony itself. The evidence is so contradictory, so full of opposite statements, that it destroys itself.

At the begining of his testimony (Rec., p. 330). Marcos Baca says that the reason he started to make a family tree was because he wanted to keep a record of the family, "and afterwards it was for the object of finding out the heirs of Luis Maria Cabeza de Baca in some partition suits that were brought against the heirs for some land that he owned in New Mexico." The witness next states that in the partition suit for Baca Location No. 1, a family tree was filed, and that he thinks he has a copy of that tree, and produces it. He is then asked if the list is a correct one of the sons and daughters and descendants of Luis Maria, and he states that it is a correct copy of the list that was presented in court in that partition suit of Location No. 1, and then he is asked if it is correct, from his investigations, and he says it is.

It appears (Rec., p. 347) that the partition suit on Location No. 1 was brought in 1875.

From the witness' statement, therefore, he began at the age of sixteen to study the family tree from mere desire, and that, at the mature age of eighteen, he began to study it for the purpose of a lawsuit.

He says (Rec., p. 330) that in the lawsuit of 1875, a family tree of the family was filed. He does not pretend to have made the tree. He had a copy of the tree filed in 1875, in the suit, produces it and says it is correct; he says it is correct from his investigations, and is a true copy of the tree filed in 1875. The list has not been changed, according to the witness, from 1875 up to date. It was correct when made. The witness offered but one list or tree during his testimony.

On page 373 of the record, the witness says that he made his original list in 1884, perhaps a little later. He made the list himself, he says, from what other people told him. He was asked if it was not copied from a geneological tree made by a lawyer, and he says it is not a copy. He is asked if he ever saw a list prior to 1884, and he says no. He is asked (Rec. 373) if he does not know now, that lists were made of the heirs in 1875, and he says he does not know, and that he has never seen the record in that case. Yet the list he offers, he says, is a true copy of the list made in the partition suit in 1875, and he says he began looking up the heirs for this partition suit in 1875. How did he know that his list was a true copy if he did not see the lists filed in the suit?

He also says that he showed to Prudencio in 1875 (Rec., p. 374), the original list of which the one produced in court is a copy.

On cross examination (Rec., p. 373) he was asked when he made the original of the list of which he produced a copy. He answered it was in 1884 or a little

later. He says he wrote down the data himself, presumably up to 1884. And at the same time he says it is a copy of a court paper made in 1875, and that it is a correct copy.

And so we have the statements:

The list is a correct copy of the one filed in the 1875 lawsuit.

He never knew that any lists of heirs were filed in the 1875 lawsuit.

He showed the original of the list he now produces to Prudencio in 1875, and Prudencio said it was correct.

The original paper, of which he now produces a copy, was made by him from scraps and conversations about 1884. This is a copy of the list.

The witness was asked if there was not a controversy over Location No. 1, and another grant (Rec., p. 348). He says there was none prior to 1875 (Rec., p. 349). It will be remembered that this is the same partition suit that the witness elsewhere states interested him in looking up the heirs, the same suit where the list of heirs was filed. He says there was no discussion, no controversy, prior to 1875. On page 350 of the record, he says that prior to 1873 he heard some claim about Float No. 1. He heard discussions.

He was asked (Rec., p. 352), if the issue in the case was not, who were the heirs of Baca? He says "yes."

"And they had a fight about who they were?" "Yes, sir." That was the question in controversy, wasn't it, as to whom the heirs * * * were?" "Yes, sir."

If the issue was, who were the heirs, and there were "discussions" in 1873, it is pretty hard to believe the discussions were not about the heirs, and who they were. It takes no very keen observer to be convinced that all of Marcos' inquiries, if he really made any, grew out of this lawsuit.

Again, the witness states (Rec., p. 355), that he had a conversation the second time with Prudencio. He says this was before the partition suit. "It may have been nearly a year." In another place he says the partition suit was brought early in 1875 (Rec., p. 347). His conversation with Prudencio must have been then in 1874. At this time he submitted to Prudencio the list of heirs, being the same list, or a copy of the one, produced in court. Marcos was then seventeen years old. The list is a complete list. Now, on page 330 of the record, he was asked if in the partition suit in 1875, a list was filed. He says, yes, and produces a copy of it, and swears it is correct, and that it is correct because of his investigations made since. It is the same list. It is hardly conceivable that the list filed in a lawsuit, undoubtedly on testimony taken in the course of the hearing, said lawsuit not having been brought until 1875, and thereafter the testimony taken should be the same list presented by Marcos to Prudencio in 1874.

Further, the witness says, as before pointed out, that

the partition suit was begun early in 1875. On page 355 of the record he says he showed the list which he produced in court to Prudencio nearly a year before the suit was brought, which would make it 1874. It appears that Marcos first spoke to Prudencio about the heirs in 1873. Here, then, is a complete family tree, reaching back for many years, covering a multitude of persons, worked out by a boy of seventeen! Compiled in a little over a year, in a country sparsely settled, wild, and with the family widely scattered. It was exactly as afterwards found by the court in the partition suit, and all the "investigations" that Marcos has made since have not changed it, for the witness swears that the one he offers now is a copy of that one, and that it is correct.

It further appears (Rec., p. 358), that Marcos had a talk with Manuel, also of course before the suit of 1875. It was probably in 1874. To Manuel, Marcos submitted the list. And Manuel said the list (Rec., p. 359) was correct. With a correct and complete list vouched for by Prudencio and Manuel, in 1874, what further was there to be done by Marcos? Every child, grandchild and great grandchild had been worked out by Marcos at the age of seventeen. Why does he say that he has made a study since 1875? And is it not strange that he does not say that Prudencio or Manuel made the list, but that he made the list himself, and submitted it, and it was found perfect?

Marcos says the controversy in 1827 was on account of some claim that her children should inherit from Luis

Maria (Rec., p. 338). Then he says (Rec., p. 338) his knowledge about this controversy is "on account of the paper which my father had, in this paper I have today." The paper referred to was the will. The will makes no mention of children.

He says (Rec., p. 338) he thinks the controversy of 1827 was before the governor. He says (same page) he does not know whether the governor had anything to do with it or not. Yet all the time he had the paper in his possession, i. e., the will, with the petition to the governor and the governor's order. On page 341 of the record, he says the first partition suit was brought in 1875 or 1876, he thinks. He is not sure of the year. On page 347, he says the suit was brought early in 1875. He has become sure of the year, and even of the time of the year. On page 341 of the record, he is not sure of the year. If not sure of the year as to the suit, why so sure Prudencio told him in 1873? Again, Marcos says he had a second talk with Prudencio, probably in 1875. It may have been nearly a year before the partition suit. That suit, he had just said, was brought early in 1875. If this be true, he must have talked with Prudencio the second time in 1874, and not in 1875. All of which shows that he is not sure of his dates, which is not remarkable; but it is remarakble that at the same time he is so certain that he talked with Prudencio in 1873.

V.

The title involved in this suit is derived under the act of Congress of June 21, 1860, and in the grant made by

the Sixth Section of that act neither Antonio nor his heirs could have had any interest.

This point is discussed at length in the joint brief on this phase of the case filed by the plaintiffs, the Santa Cruz Development Co., and the Bouldin defendants, and we refer the court to that brief for our arguments on this point.

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